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No. 09-1478

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES ALFORD, Deputy Sheriff,
Petitioner,

v.

SARAH GREENE, et al.
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

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SARAH GREENE, et al.
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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit as the authorized law officer of the county, pursuant to Supreme Court Rules 37.2(a) and 37.4.[1]

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1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(continued...)

INTEREST OF AMICUS CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a compelling interest in protecting children and ensuring their safety and in the prompt and effective investigation and prosecution of suspected child abuse.

Los Angeles County governmental agencies conduct a large number of child abuse and neglect investigations. *The State of Child Abuse in Los Angeles County*, prepared by the Los Angeles County's Inter-Agency Council on Child Abuse and Neglect (ICAN), reported the following data for 2008.[2] The Department of Child and Family Services received 166,745 referrals of child abuse or neglect, including 52,242 referrals for sexual and physical abuse and severe neglect. ICAN Report at 161. Law enforcement agencies conducted over 35,000 investigations.[3] Prosecutors filed over 3,400 cases. *Id* at 283.

(...continued)

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

2. Los Angeles County Inter-Agency Council on Child Abuse and Neglect, *The State of Child Abuse in Los Angeles County* (April 2010) <http://ican.co.la.ca.us/dataD loads.htm (ICAN report).

3. The Los Angeles County Sheriff's Department had 3,170 cases reported by station. ICAN Report at 389. The Juvenile Division of the Los Angeles Police Department conducted 27,454 investigations (criminal and non-criminal). *Id.* at 39. Other independent police agencies reported a total of 5,437 investigations. *Id* at 54-55. The other nine city attorneys' offices in Los Angeles county did not report referral and filing statistics.

In Los Angeles County, coordination of child abuse investigations and interviews of child victims are encouraged.[4] A significant number of these investigations include interviews of suspected victims in their schools, particularly if the suspected abuser is a household member. California law specifically allows police investigators and government social workers who are investigating child abuse and neglect to conduct these interviews at school. Cal. Penal Code § 11174.3 (Deering 2010).

The Ninth Circuit held in *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), that a government official must have a warrant, court order, parental consent, or exigent circumstances before "seizing" a child at public school to conduct an interview regarding suspected abuse. The Ninth Circuit's per se holding that all public school interviews of children regarding suspected abuse are "seizures" within the meaning of the Fourth Amendment is a gross mischaracterization with very serious consequences. Requiring a warrant, court order, parental consent, or exigent circumstances before any child may be interviewed at school regarding suspected abuse, hampers the efforts of law enforcement officers and prosecutors to promptly and effectively investigate and prosecute child abuse and most importantly, the efforts to protect children and ensure their

4. Los Angeles County Inter Agency Council on Child Abuse and Neglect, *Los Angeles County Child Abuse and Neglect Protocol* (August 2009) <http://www.ican4kids.org/documents/LACounty_Child_Abuse_and_Neglect_Protocol.pdf> (ICAN Protocol). The ICAN Protocol serves as a guide to the recommended practices for the identification, reporting, investigation, case management and prosecution of child abuse and neglect cases, including a preference for coordinating efforts so that providers will "lessen emotional trauma to the victims occasioned by repeat interviews ... and other governmental interventions" and "promote inter-agency investigation and case management." ICAN Protocol at vii, 1. Specific recommendations include a multi-disciplinary approach and coordinated interviews. *Id.* at 9, 34.

safety. It is therefore in the interest of amicus to urge that certiorari be granted.

SUMMARY OF ARGUMENT

Clearly, not every encounter with a police officer triggers the Fourth Amendment. Generally, only if the encounter could be described as a "seizure" or a "search" is the Fourth Amendment implicated. An encounter with the police that is not a seizure is generally referred to as a "consensual encounter." The importance of such an encounter is that it does not need to be justified under the Fourth Amendment. Whether a seizure has taken place is to be determined by an objective test, which asks not whether the person involved in the police encounter perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.

Amicus asserts herein that an interview of a child at a public school conducted to determine whether that child is a victim of child abuse or sexual molestation is not a seizure because when an officer questions a child about the child's possible victimization, objectively there is nothing per se to suggest that the child would not be free to leave, free to move, or free to simply ignore the questions.

The fact that, in the interests of privacy, a child is moved from a classroom to a school office for the interview makes no difference: children are directed to move from place to place at school all day every day, making the interview no more intrusive than the child's daily experience at school.

The fact that the officer involved is armed is also of no consequence: it is common knowledge that officers carry weapons as part of their uniform; upon seeing a gun in an officer's holster, it is not objectively reasonable for a crime victim to believe that the police officer would pull it out and shoot her if she ignored questions regarding her victimization.

The fact that the interview lasts an hour, even two, is also insignificant: there is an art to interviewing crime victims, particularly child victims, which involves taking the time necessary to make the child comfortable by asking safe questions and getting to know the child before asking about the suspected abuse or molestation. These factors do not transform a consensual encounter into a seizure of the victim that implicates the Fourth Amendment.

ARGUMENT

I. THIS COURT MAY CONSIDER AN ISSUE NOT RAISED DIRECTLY BY THE PARTIES BUT RAISED IN AN AMICUS BRIEF

In this case, the Ninth Circuit agreed, without providing any analysis whatsoever, with the district court that an in-school interview of a child victim regarding suspected abuse was a seizure. None of the parties have thus far directly contested this issue.

In general, only those issues raised by the parties or fairly included in such issues will be considered by the Supreme Court. Sup. Ct. R. 14(1)(a). However, this Court need not always strictly adhere to this rule. Indeed, this Court may consider an issue not raised directly by the parties but raised in an amicus brief. *See Teague v. Lane*, 489 U.S. 288, 300 (1989).

Accordingly, amicus urges this Court to address the issue of whether an in-school interview of a child victim regarding suspected abuse is necessarily a seizure. Amicus asserts that the issue is fairly included, though not directly raised, in the issues stated by the parties. Moreover, even if this Court finds that the issue was not fairly included within those issues raised by the parties, it has been raised by an amicus. *Teague, supra*, 489 U.S. at 300.

II. AN INTERVIEW OF A CHILD AT A PUBLIC SCHOOL REGARDING SUSPECTED ABUSE IS NOT A "SEIZURE" PER SE UNDER THE FOURTH AMENDMENT BECAUSE OBJECTIVELY WHEN A POLICE OFFICER QUESTIONS A CHILD WHO IS A SUSPECTED *VICTIM*, NOT A SUSPECT HERSELF, THERE IS NOTHING WHICH AUTOMATICALLY CONVEYS THAT THE CHILD IS NOT FREE TO LEAVE OR MOVE OR IGNORE THE QUESTIONS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend. IV.

This Court has examined, in various contexts ranging from the city street, to airports, to the workplace, to buses, and to the country's borders, the question of whether police questioning amounts to a "seizure" prohibited by the Fourth Amendment. In a long line of cases, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), this Court has held multiple times that police questioning itself is not a seizure.

Specifically, in *Terry*, this Court held that a police officer may walk up to anyone on the street and ask a question without running afoul of the Fourth Amendment. *Terry*, 392 U.S. at 22-23. This Court recognized in dictum that "not all personal intercourse between policemen and citizens involves 'seizures' of persons and only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19, fn.16.

Years later, Justice Stewart proposed a similar standard: that a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In that case, this Court held that no seizure of the respondent had occurred when police agents had approached her on a public concourse of an airport, asked her if she would show them her ticket and identification, and posed a few questions to her. *Id.* at 555.

Two other cases regarding the constitutionality of police questioning at the airport soon followed. In *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion), this Court held that respondent, a nervous young man who paid cash for an airline ticket from Miami to New York under an assumed name and carried heavy suitcases, could be stopped by police and temporarily detained while the police investigated whether he was a drug courier. *Id.* at 494. A seizure only occurred once the officers had asked him to accompany them to a small room, retained his ticket and identification, and indicated that he was not free to leave. *Id.* at 504. However, in so holding, this Court still recognized that mere police questioning does not constitute a seizure, explaining that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answer to such questions." *Id.*

In *Florida v. Rodriguez*, 469 U.S. 1, 4-6 (1984) (per curiam), this Court held that when an officer, asking respondent in an airport lobby if they might talk and suggesting that they move 15 feet away in order to talk, was not conduct that rose to the level of a seizure. The Court stated it was "the sort of consensual encounter that implicate[d] no Fourth Amendment interests." *Id.*

This Court also held that no seizure occurred when INS agents seeking to identify illegal aliens conducted work force surveys inside a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees. *INS v. Delgado*, 466 U.S. 210, 220-221 (1984). This Court specifically rejected the argument that the blocked exits turned the incident into a seizure, stating instead that since respondents were free to go about their own business in the workplace after a question was put to them, respondents were not in fact detained. *Id.* at 220.

This Court later ruled in *Michigan v. Chestermut*, 486 U.S. 567, 575 (1988), that no seizure occurred when police officers in a squad car drove alongside a suspect who turned and ran down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, displaying of a weapon, or blocking of the suspect's path), the Court concluded that the police conduct "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon his freedom of movement." *Id.*

In *California v. Hodari D.*, 499 U.S. 621, 629 (1991), this Court held that an actual chase did not amount to a seizure because the suspect failed to comply with the officer's order to stop. This Court held that a Fourth Amendment "seizure" of a person is the same as a common law arrest and that there must be either application of physical force (or the laying on of hands) or submission to the assertion of authority in order to constitute a seizure. *Id.* at 626, fn. 2.

In *Florida v. Bostick*, 501 U.S. 429, 431-432 (1991), police officers, conducting a "bus sweep" aimed at detecting illegal drugs and their couriers, boarded a bus to inspect tickets and identification of selected passengers. This Court began its analysis with the observation that since *Terry*, it had repeatedly held that mere police questioning was not a seizure. *Id.* at 434. This Court then explained that the mere fact that Bostick did not feel free to leave the bus did not

mean that the police had seized him, he was a passenger on a bus that was soon to depart, such that his movements were "confined" regardless of the conduct of the police officers. *Id.* at 435-436. The Court asserted that the case was "analytically indistinguishable from *Delgado*. Like the workers in that case [subjected to the INS "survey" at their workplace], Bostick's freedom of movement was restricted by a factor independent of police conduct – i.e, by his being a passenger on a bus." *Id* at 436. Accordingly, this Court held that the appropriate inquiry in determining whether a seizure had occurred was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.*

Relying upon the principles pronounced by this Court in these cases in which this Court has stated time after time that mere police questioning is not seizure, Amicus asserts that an interview of a child at a public school by a police officer regarding suspected child abuse is not a seizure per se and that a seizure did not occur in the case at bar.

The fact that in order to conduct the interview, a child may be moved from the classroom to another room at the school, which occurred in this case, does not turn the encounter into a seizure. When a child is at school, he or she[5] is not free to leave. When a child is at school, her movements are already seriously restricted. A child at school goes where teachers and administrators tell her to go and does not go where she is told not to go. Every single day in this country, children are called from their classrooms and told to go the principal's office, a counselor's office, the nurse's office, or to another classroom. There could be any number of reasons to do so; to chastise the child for bad behavior, to praise her for a good deed, to check for head lice, or to place her with a peer group with similar math skills. The point is that the movement from one room within

5. For convenience, as Respondent is a female, female pronouns in reference to the victim will be used henceforth.

the school to another is not a seizure. Like the workers in *Delgado* and the man on the bus in *Bostick*, a child's freedom of movement is seriously impacted at school in ways that are independent of any kind of police conduct: on the one hand, a child must go where she is told regardless of police presence; on the other hand, irrespective of police presence, a child must stay where she is told. Consequently, the fact that a child is moved from one room to another in order to effect an interview does not turn an in-school interview of a child into a seizure: the movement is no more restrictive or intrusive than what a child may experience at school every day.

The Ninth Circuit in this matter placed particular emphasis on the fact that the sheriff was armed. *Greene v. Camreta*, 588 F.3d at 1027-1028. Amicus asserts that this fact does not turn an in-school interview of a child regarding suspected abuse into a seizure. When an adult suspect is detained on the streets by an armed police officer, the belief is not unreasonable that if that person is uncooperative, he runs the risk of being shot. However, when a child, who is suspected not of having perpetrated a crime but of being the *victim* of a crime, sits down to be interviewed by a police officer, it is patently absurd to believe that if the child does not cooperate, the officer will shoot her. It is common knowledge that police officers carry firearms; children routinely see armed officers on television, guarding banks, guarding airports. A reasonable person would not believe that an officer would shoot her, a victim, for refusing to answer questions: the likeliest source of stress for a child in this type of scenario is the desire to still protect the abuser, particularly if that person is a family or household member. In the matter *sub judice*, the child victim specifically stated that she was not particularly distressed by the sheriff's presence: she testified that she is generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him. *Id.* at 1017.

The fact that nothing actually happens during an interview to prevent a child from leaving also demonstrates

that it is not a seizure. If a child says "I want my mommy," she stands up to leave, the sheriff blocks the door or tells her "Stop" or "Sit down," and the child does not leave, then a seizure may occur. However, in *Greene*, the child did not ask to call home, did not ask to have Friesen or her parents with her, and did not cry. *Greene v. Camreta*, 588 F.3d at 1017. Indeed, the record is devoid of any facts which objectively show that anything occurred to actually prevent the victim in *Greene* from leaving.

Another important factor is that a victim interview to investigate suspected child abuse is to benefit the child, not to prosecute her. Questioning victims and witnesses to help solve and prevent crime is not the same as questioning a suspect and should not be treated the same for Fourth Amendment purposes.

Finally, the length of an in-school interview cannot be ignored. The amicus recognizes that the type of police questioning approved in *Terry* lasted only minutes. There is clearly a time continuum of a police detention, ranging from minutes to hours, for which a seizure under the Fourth Amendment still may not occur; the length of time is not determinative. Child interviews take time. They should not be rushed. Any experienced interviewer does not go straight to asking the child questions about the suspected abuse but instead first spend time talking about more comfortable subject matters in order to both get to know the child and gain her trust. Viewed in that context, an hour, even two, does not turn the event into a seizure. An interview that keeps a child at school past the end of the regular school day may be problematic, but an interview conducted during the regular school day is not a seizure. In this case *sub judice*, the interview lasted anywhere from one to two hours during which nothing unusual occurred. *Greene v. Camreta*, 588 F.3d at 1017.

The protections of the Fourth Amendment were intended to protect citizens against state officers who were raiding the homes of colonials in search of smuggled goods,

not to prevent police officers from interviewing child victims of suspected abuse in order to help capture the suspect and protect the child. In accepting the notion that an interview of a child at school by a police officer is a seizure per se, the Ninth Circuit engaged in a gross mischaracterization. It is of great nation-wide importance that this Court review the Ninth Circuit's decision and consider this specific issue in its analysis.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Ninth Circuit's ruling in this matter.

Respectfully submitted,

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